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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940.

No. 532.

CARL F. KORTEPETER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

No. 533.

GURNEY G. DERBYSHIRE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI.

With Supporting Brief.

PAUL Y. DAVIS,
Attorney for Petitioners.

ERNEST R. BALTZELL,
WILLIAM G. SPARKS,
GUSTAV H. DONGUS,
Of Counsel.

C. E. Pauley & Co., Inc., Indianapolis

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PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

Your Petitioners, Carl F. Kortepeter and Gurney G. Derbyshire each respectfully present that:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition seeks review of the opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit, rendered July 22, 1940, (R.* 220-227), rehearing denied September 24, 1940, (R. 229), affirming judgments of conviction rendered against petitioners by the District Court of the United States for the Southern District of Indiana. The opinion is not yet reported.

Counts I and II of the indictment (R. 1-2) charged diversion of W. P. A. funds and labor in violation of § 12 of the Emergency Relief Appropriation Act of 1937, 52 Stat. 817, and § 19 of the Emergency Relief Appropriation Act of 1938, 52 Stat. 809. Count III charged (R. 3-13) conspiracy to defraud the United States (Criminal Code § 37, 35 Stat. 1096) by diversion of W. P. A. funds and labor. Sentences of eighteen months and one year and one day (R. 158-159) are necessarily referable to Count III, maximum penalty under the other counts being one year.

By motion for directed verdict petitioners each challenged the sufficiency of the evidence (R. 84-86), and the overruling of this motion was assigned as error by each. (R. 200, 204.)

The planned enterprise constituting the gist of the alleged conspiracy was the use of W. P. A. funds and labor, allotted under "blanket" projects for use on unspecified county highways, to build roads through suburban subdivision property owned by petitioner Derbyshire, Korte-

* The record consists of two volumes, one printed in the court below, and one volume of exhibits, not printed. The printed volume is referred to as R., the second unprinted volume as II. R.

peter's father-in-law, upon rights of way dedicated as public highways by Derbyshire and accepted as such by the Board of Commissioners of Marion County.

Evidence as to the above facts was undisputed and was so treated by the Circuit Court of Appeals. (R. 221.)

Three "project proposals" executed by the Board of Commissioners of Marion County, three project applications, executed by the local W. P. A. office, three Presidential letters allotting funds, and various rules, regulations and bulletins of the W. P. A. were alleged in the indictment to have made this use of the funds illegal. (R. 9.)

Motions for directed verdict having been overruled (R. 133), the trial court authorized the jury to find that the acts done would constitute a diversion of funds if the highways, though properly dedicated, were "without the scope of the roads or highways which could have been improved under authority of the letter of the President . . . and bulletins issued by the proper authorities." (R. 95.)

Thus, although there was no dispute as to what defendants had done or agreed to do and the *facts* surrounding the use of the funds were undisputed, so that under the Government's theory the legality of the use depended upon a construction of written documents, the jury were not only left to determine this question of construction, but the Circuit Court of Appeals also refused to determine it, treating the jury verdict as conclusive, as follows:

> "*Sufficiency of the evidence.* Appellants earnestly insist that all their acts were legitimate and permissible under the law; that the roads constructed were within the purview of authorized works.

> We are satisfied that the evidence was such as to require this question to be submitted to the jury. The most that can be said of the evidence is that a jury might, if it accepted defendants' version, have found them not guilty." (R. 221-222.)

As will be pointed out in the brief in greater detail, the Court, in so doing, considered only those portions of the writings supporting the jury's verdict, and ignored other portions tending to an opposite conclusion.

Thus three Presidential letters authorizing the expenditure are referred to in the indictment. The Court in its opinion (R. 223) refers only to one of these which was Government's Exhibit 4 (II R. 175, R. 20), makes from this an "inescapable" deduction that the project concerned only existing roads, and wholly ignores the original Presidential authorization "To construct . . . highways, roads and streets . . . upon property where the necessary leases or easements will be or have been obtained." (Defts.' Ex. E, II R. 319, R. 77.) From this there is an equally "inescapable" deduction that *new* construction was authorized. That the latter was not wholly irrelevant is evidenced by the fact that the two other Presidential letters were issued on applications which were respectively a "supplement" (Defts.' Ex. F, II R. 321, R. 77) and a "continuation" (Gov. Ex. 3, II R. 170, 172, R. 19) of the original project authorized by the original Presidential letter.

There was no evidence that petitioner Derbyshire had knowledge of any of the terms or limitations of any of the proposals, applications, Presidential letters, rules or regulations, which the Circuit Court of Appeals treated as determinative of the "purview of authorized works" except evidence that Kortepeter advised him that he would first

have to dedicate the streets to the county. (R. 52, 68.) Derbyshire complied with the requirement for dedication. (Ex. A, II R. 304, R. 27, Ex. B, II R. 305, R. 53.) Notwithstanding the total absence of evidence to show that Derbyshire had any knowledge that the proposed use of funds was illegal, the Circuit Court of Appeals has found evidence sufficient to support his conviction of conspiring with intent to defraud, saying:

> "Defendants must have known or at least had good reason to question the legality of a work, the entire benefit of which was to enure to the owner of a tract of land not yet subdivided." (R. 223.)
>
> "We are also convinced that in the absence of express authorization, it must have been apparent to both defendants, that the expenditure of money and labor for private gain, such as here disclosed, was illegal." (R. 224.)

Finally the record is barren of any evidence of concealment, chicanery, trickery, or misrepresentation. Whatever Kortepeter and Derbyshire did was done openly, in the public view, without any badge of fraud. Kortepeter ordered the work to be done (R. 33) and disbursements to pay for it were made by the Disbursing Clerk to the foremen (R. 46) upon authority of reports of supervising timekeepers. (R. 21.) There is no evidence that any of these persons was in any way misled or deceived.

II.

JURISDICTIONAL STATEMENT.

Each petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit which affirmed the judgments of conviction July 22, 1940. (R. 219.) Timely petition for rehearing was filed (R. 229) and overruled September 24, 1940. (R. 229.) This Court has jurisdiction to review the judgment under the Act of March 8, 1934 (48 Stat. 926, 18 U. S. C. A. § 723a). This petition is filed before the expiration of the thirty days prescribed by Rules XI and XIII of the Rules of Practice and Procedure promulgated May 7, 1934 (292 U. S. 661, 666) made applicable by Rule 38 (2) of this Court. (306 U. S. 717.)

Excluding five Sundays (September 29, October 6, 13, 20 and 27) and one legal holiday, October 12 (Indiana Acts 1931, Ch. 88, § 1, p. 254), such thirty days expires October 30, 1940.

III.

QUESTIONS PRESENTED.

(1) On the assumption that the project proposals and applications for allotment of W. P. A. funds indicated an intention to use the money only on *existing* "farm to market" highways, did such limitation have any weight or controlling effect when not embodied in the Presidential authorization for the expenditure of the funds?

(2) Whether the Circuit Court of Appeals was justified in giving weight to the jury's verdict that the expenditure of W. P. A. funds was not "within the purview of the authorized works," when the scope of the project necessarily

depended upon the construction of the Appropriation Acts and other writings, and the facts as to the use of the funds were undisputed?

(3) Intent to defraud the United States being an essential part of the offense charged in each count of the indictment, and the "fraud" charged consisting entirely of the actual or planned use of W. P. A. funds and labor in alleged contravention of certain administrative proposals, orders and regulations of which the defendant Derbyshire is not shown to have had any knowledge, could the requisite fraudulent intent to convict the defendant Derbyshire be inferred from the fact that he was deriving a benefit from the work, or from negligence in failing to make further inquiry?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The decision of the Circuit Court of Appeals that the terms of a project proposal stating intended use of funds appropriated for work relief under the Emergency Relief Appropriation Acts of 1937 and 1938 (50 Stat., as amended, 52 Stat. 817; 52 Stat. 809) could restrict and limit the Presidential authorization for use of the funds, is the decision of an important question of federal law which has not been but should be settled by this Court.

(2) The exact nature of the actual or contemplated use of W. P. A. funds and labor in building roads, constituting the gravamen of the offense charged in each count of the indictment, having been disclosed by uncontradicted evidence, and "the purview of authorized works" having been

decided to be dependent upon written proposals, applications, letters, bulletins, and regulations, the decision of the Circuit Court of Appeals that the question whether or not the roads constructed were "within the purview of authorized works" was properly submitted to the jury and giving effect to the jury's verdict, determined an important question of federal law in a way probably in conflict with the applicable decision of this Court in *Hamilton v. Liverpool, London and Globe Insurance Co.*, (1890), 136 U. S. 242, and in conflict with the decisions of the following Circuit Courts of Appeals, viz.:

Equitable Life Assurance Society of the United States v. Wells, (C. C. A. 6, 1939) 101 F. 2d 608;

Union State Bank & Trust Co. v. Northwestern Life Ins. Co., (C. C. A. 5, 1932) 55 F. 2d 1070;

Burrows & Kenyon, Inc., v. Warren, (C. C. A. 1, 1925) 9 F. 2d 1;

Schloss Bros. & Co. v. Charles Stern Co., (C. C. A. 5, 1929) 36 F. 2d 628;

McKnight v. U. S., (C. C. A. 9, 1935) 78 F. 2d 931;

United States v. Dennett, (C. C. A. 2, 1930) 39 F. 2d 564, 76 A. L. R. 1092;

United States v. White Oak Coal Co., (C. C. A. 4, 1925) 5 F. 2d 439.

(3) The decision of the Circuit Court of Appeals that petitioner Derbyshire, who was not shown to have had any knowledge of any of the proposals, applications, letters, bulletins, rules or regulations held to have placed the actual

and contemplated use of W. P. A. funds and labor without the purview of authorized works, could nevertheless be found to have had the intent to defraud the United States requisite to conviction under each count of the indictment, is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Landen v. United States,* (C. C. A. 6, 1924), 299 Fed. 75.

(4) The decision of the Circuit Court of Appeals that petitioner Derbyshire, who was not shown to have had any knowledge of any of the proposals, applications, letters, bulletins, rules or regulations, held to have placed the actual and contemplated use of W. P. A. funds and labor without the purview of authorized works, could nevertheless be found to have had the intent to defraud the United States requisite to conviction under each count of the indictment, is in probable conflict with the decisions of this Court in *Pettibone v. United States,* (1893), 148 U. S. 197, and *Morrison v. California,* (1934), 291 U. S. 82.

WHEREFORE, your petitioners each respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full, true and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket No. 7176 and No. 7177, respectively entitled "The United States of America, Plaintiff-Appellee, v. Carl F. Kortepeter, Defendant-Appellant," and "The United States of America, Plaintiff-Appellee, v. Gurney G. Derbyshire, Defendant-Appellant," and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit

in each of said cases may be reversed by this Court, and that each of your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

CARL F. KORTEPETER,
GURNEY G. DERBYSHIRE,
By PAUL Y. DAVIS,
Counsel for Petitioners.

ERNEST R. BALTZELL,
WILLIAM G. SPARKS,
GUSTAV H. DONGUS,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is found in the record at pages 220 to 227. It is not yet officially reported.

II.

JURISDICTION TO REVIEW THE JUDGMENT.

This Court has jurisdiction to review the judgment under the Act of March 8, 1934 (48 Stat. 926, 18 U. S. C. A. § 723a). The annexed petition, this brief and the record have been filed before the expiration of the thirty days prescribed by Rules XI and XIII of the Rules of Practice and Procedure promulgated May 7, 1934 (292 U. S. 661, 666), made applicable by Rule 38(2) of this Court. (306 U. S. 717.)

Excluding five Sundays (September 29, October 6, 13, 20 and 27) and one legal holiday, October 12 (Indiana Acts 1931, Ch. 88, § 1, p. 254), such thirty days expires October 30, 1940.

STATEMENT OF THE CASE.

In addition to the summary statement contained in the petition a more extended summary of the various writings referred to in the opinion is necessary to proper understanding of the case.

July 17, 1937, the President allotted $828,518 for county wide use under Project Number 465-52-1-15 on unspecified highways in Marion County, outside Indianapolis, Indiana.

> "To construct, surface, resurface, grade, repair or improve or aid in constructing, surfacing, resurfacing, grading, repairing or improving highways, roads and streets and work incidental thereto. All work to be on non-Federal publicly owned property or upon property where the necessary leases or easements will be or have been obtained by local authorities; provided, that no Federal funds will be used for the purchase of land or for the payment of leases or easements.

INDIANA		State W. P. A. Number	Allotment	Project Number
Location	Description			
Marion Co.	County-wide.	85072 (302056)	$828,518	O. P. 465-52-1-15
52-000-49	Repair and improve county roads, not a part of the Federal Aid Highway			
1080	System, throughout Marion County, exclusive of the city of Indianapolis, by (widening right-of-way, resetting fences, ditching, building berms, grading, resurfacing with bituminous macadam and/or gravel), and performing appurtenant work. County owned property."			

Ex. E, II R. 317, 319, R. 77.

Upon application supplemental to this project (II R. 328) the President allotted an additional $1,005,959 to

"Marion Co.	Repair and improve county roads,
County-wide	not a part of the Federal Aid Highway System, throughout Marion County, exclusive of the city of
52-000-49	Indianapolis, by widening right-of-way, resetting fences, ditching, building berms, grading, resurfac-
0-1080	ing with bituminous macadam and/or gravel, and performing appurtenant work. County-owned property."

Upon application made to continue (Ex. 3, II R. 22, R. 19) the same project the President allotted an additional $2,187,179 to

> "Improve county-owned roads throughout Marion County including widening; filling; grading; draining; cutting ditches; shaping berms; surfacing; clearing; resetting fences; landscaping; improving and constructing small bridges, culverts, and other structures; painting; and performing incidental and appurtenant work."
>
> Ex. 4. II R. 174, 175, R. 20.

Government's Exhibit X3 (II R. 296-299) indicates that both "supplemental" and "continuation" project applications were used for procuring funds to be used to provide additional funds for work to be operated *within the scope of the original authorization,* the second being used where funds to be allotted have been appropriated under subsequent statute (II R. 297).

It is significant that in the sponsors' *proposals* for each of the above allotments, reference was made to anticipated construction of "farm to market" highways, and to intended repair of flood damage (II R. 308, 323, 156). In the first two *applications* these references were repeated (II R. 315, 329); in the last *application,* it was simply stated that the purpose was to provide "for continuation of work formerly approved" (II R. 172), but in no instance does any express limitation to "farm to market highways," "repair" or "rehabilitation" of "existing highways," or other of the limitations referred to by the Circuit Court of Appeals appear in the Presidential authorization.

General Letter 190, Government's Exhibit 69 (II R. 178-180), dated July 12, 1938, purports to prescribe "General Requirements for Eligibility" and is on its face a direction

for the preparation of applications for new projects, without any express reference to operation of projects already approved. It assumes to declare ineligible projects involving the extension or improvement of streets where abutting property is in the hands of a small number of individuals. (II R. 178.) State Bulletin 103, issued by the Indiana State Administrator, did assume to interpret this as applying to work under "approved projects operating." (Ex. 68, II R. 177.)

SUMMARY OF THE ARGUMENT.

I.

Evidence as to the exact character of the actual and contemplated use of W. P. A. funds and labor having been undisputed, the question whether or not such use was unauthorized was a question for the Court, not the jury, and in upholding the Trial Court in leaving this question to the jury, and in sustaining the jury's verdict, without consideration of all applicable instruments, the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and of other Circuit Courts of Appeals.

Hamilton v. Liverpool, London and Globe Insurance Co., (1890) 136 U. S. 242;

Equitable Life Assurance Society of the United States v. Wells, (C. C. A. 6, 1939) 101 F. 2d 608;

Union State Bank & Trust Co. v. Northwestern Life Ins. Co., (C. C. A. 5, 1932) 55 F. 2d 1070;

Burrows & Kenyon, Inc. v. Warren, (C. C. A. 1, 1925) 9 F. 2d 1;

Schloss Bros. & Co. v. Charles Stern Co., (C. C. A. 5, 1929) 36 F. 2d 628;

McKnight v. U. S., (C. C. A. 9, 1935) 78 F. 2d 931;

United States v. Dennett, (C. C. A. 2, 1930) 39 F. 2d 564, 76 A. L. R. 1092;

United States v. White Oak Coal Co., (C. C. A. 4, 1925) 5 F. 2d 439.

II.

To the extent that it assumed to construe the various documents thought to delimit the authorized purview of the construction permitted to be done, the Circuit Court of Appeals gave expressions of intention in the Sponsors' proposal for allotment of funds controlling effect over broader authorization contained in the Presidential Letter of allotment, and thereby erroneously decided an important question under the Emergency Relief Appropriation Act of 1938.

III.

Knowledge of facts making a plan unlawful or fraudulent is of the essence of the intent to defraud necessary to conviction under the indictment in this case, and such knowledge or intent cannot be inferred from the fact that Derbyshire got something for nothing.

Pettibone v. United States, (1893) 148 U. S. 197, 206-207;

Morrison v. California, (1934) 291 U. S. 82;

Landen v. United States, (C. C. A. 6, 1924) 299 Fed. 75.

IV.

The judgment should be reversed as to both defendants under any ground stated in the petition. Since a conspiracy required more than one conspirator, acquittal of Derbyshire necessarily requires acquittal of Kortepeter.

Morrison v. California, (1934) 291 U. S. 82.

ARGUMENT.

I.

Evidence as to the exact character of the actual and contemplated use of W. P. A. funds and labor having been undisputed, the question whether or not such use was unauthorized was a question for the Court, not the jury, and in upholding the Trial Court in leaving this question to the jury, and in sustaining the jury's verdict, without consideration of all applicable instruments, the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and of other Courts of Appeals.

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United States v. Dennett, (C. C. A. 2, 1930) 39 F. 2d 564, 76 A. L. R. 1092;

United States v. White Oak Coal Co., (C. C. A. 4, 1925) 5 F. 2d 439.

The petitioners have been convicted of diverting W. P. A. appropriations "for the benefit of persons not entitled thereto," and of conspiring to defraud the United States by causing W. P. A. appropriations to be applied to unauthorized work, which was, as stated in the opinion of the Circuit Court of Appeals "in laying two streets in a fourteen-acre tract of farm land owned entirely by Derbyshire." (R. 222.) Derbyshire dedicated the streets to the county, which dedication was accepted. (Defts.' Ex. A, II R. 305, R. 27.)

As pointed out in the petition for certiorari, the Trial Court left to the jury to determine, upon undisputed evidence, whether the roads or highways *even though dedicated to public use* were without the scope of permissible construction "under the letter of the President and bulletins issued by proper authorities." (R. 95.) The Circuit Court of Appeals sustained this action, and in upholding the verdict considered *one* project proposal, *no* application, (although the application of this series did not embody the same terms as the proposal), and *one* Presidential Letter.

The Court did not decide that the Presidential Letter of 1937 (Defts.' Ex. E, II R. 319, R. 77), which clearly authorized construction of new roads, was inapplicable. Surely it was not intended to hold it inapplicable by mere silence, when the Appropriation Act of 1938 had authorized continuation of projects begun in 1937, and departmental practice carried this into effect by directing such continuation to be applied for by "continuation applications," one of which gave rise to the only Presidential Letter considered. The original Presidential Letter, as well as the other proposals and applications mentioned in the indictment, were wholly ignored and the jury's verdict was supported on those portions of the writings most favorable to the

Government's contention. Thus petitioners have never had a decision by a court on these questions of construction. The jury was left to determine whether the roads were within the purview of authorized work, and its verdict has been upheld like a decision on a question of fact, as one supported by some evidence, whereas the question was one of law for the Court.

In affirming a directed verdict for defendant in an action on an insurance policy in *Hamilton v. Liverpool, London and Globe Ins. Co.*, 136 U. S. 242, this Court said (page 255):

> "Upon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree, (as in *Uhrig v. Williamsburg Ins. Co.*, 101 N. Y. 362, cited for the plaintiff,) on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law, to be decided by the court. *Turner v. Yates*, 16 How. 14, 23; *Bliven v. New England Screw Co.*, 23 How. 420, 433; *Smith v. Faulkner*, 12 Gray. 251."

Illustrative of decisions of Circuit Courts of Appeals is *Burrows & Kenyon, Inc. v. Warren*, (C. C. A. 1, 1925) 9 F. 2d 1. The jury had made specific finding that by a certain telegram a buyer had waived his right to reject an instalment delivery under a sales contract. In rejecting a verdict embodying this conclusion the Court said:

> "The court also submitted a special question to the jury, as follows:
>
> 'Did the defendant waive any right to object to the proposed delivery of so much of the cargo as

conformed to the contract on the ground that excess lumber was included in it?

'The jury answer: Yes.'

We have difficulty in seeing any legal significance in this finding even if it is legally grounded. It is obviously nothing but the jury's interpretation of the buyer's telegram, supra, sent to the seller on the morning of June 26, when the buyer learned that the invoice covered 861,167 feet, instead of 684,551 feet. The construction of writings is ordinarily for the court, not for the jury. Compare *Goddard v. Foster,* 17 Wall. 123, 142, 21 L. Ed. 589; *General Motors v. Abell,* (C. C. A.) 292 F. 922, 926." (Pages 3 and 4.)

That treating the jury verdict as conclusive was highly prejudicial is shown by examination of the original Presidential Letter of July 17, 1937. This was an authorization which by no possibility could be limited to *existing* roads, since it authorized work wherever "easements . . . *will be* or have been obtained." Since the Presidential authorization referred to by the Court was for continuation of this project it is clear that consideration of all the documents would preclude limitation to existing roads and farm to market highways.

Petitioners are entitled to, but have not had the decision of, *a court* as to the authorized scope of the project, giving due consideration to *all* documents, and not merely a jury verdict, which has been sustained on consideration of only those documents and only those portions of documents which tend to support it.

II.

To the extent that it assumed to construe the various documents thought to delimit the authorized purview of the construction permitted to be done, the Circuit Court of Appeals gave expressions of intention in the Sponsors' proposal for allotment of funds controlling effect over broader authorization contained in the Presidential Letter of allotment, and thereby erroneously decided an important question under the Emergency Relief Appropriation Act of 1938.

The Circuit Court of Appeals quotes (R. 222) a portion of the third project proposal of June 17, 1938 (II R. 157), indicating an intent to apply funds to work on a "hard surface belt" of "farm to market highways," and states (R. 223) that "by no stretch of liberal interpretation could the two roads or lanes here involved, one leading to a creek, be considered as part of any such highway system." The Presidential authorization next quoted (R. 223) contains no mention of "farm to market highways" or "hard surface belts." No limitation is placed upon the type of roads to be constructed except that they be "county owned," and they may be located "throughout Marion County."

Further, the Court quotes (R. 223) from the *proposal* the words "rehabilitation," "reconstruction" and "rebuilding," as referring only to the construction of *existing* roads, although no such words are used in the Presidential Letter of authorization. Finally, it is said that "The only reasonable interpretation of these two documents excludes the original construction of new roads on a privately owned farm tract." (R. 223.)

It thus clearly appears that the proposal is given controlling importance over the Presidential Letter itself, although the purpose expressed in the Emergency Relief

Appropriation Act is to "provide relief and work relief for persons in need," and the President in carrying out this purpose might, and doubtless did, consider that this purpose would be better served by giving broader authority than requested by the Sponsor, even though (which does not actually appear) the Sponsor intended to work only on already existing highways.

We submit, therefore, that in giving the project proposal controlling effect over the Presidential Letter, the Circuit Court of Appeals has misapplied the Emergency Relief Appropriation Act of 1938. Since there was appropriated under this Act a total of $1,425,000,000 for use over the entire United States, we suggest that this question alone is of sufficient importance to require the intervention of this Court.

III.

Knowledge of facts making a plan unlawful or fraudulent is of the essence of the intent to defraud necessary to conviction under the indictment in this case, and such knowledge or intent cannot be inferred from the fact that Derbyshire got something for nothing.

The petitioners' conviction for diversion of W. P. A. funds, and for conspiracy to defraud the United States by so doing, does not rest upon use of the funds contrary to any express provision of the Emergency Relief Appropriation Acts, but upon a use of funds which a *jury* has found to be outside the purview of authorized works as determined by administrative orders and bulletins. They are thus found guilty of crime, not by reason of having done acts specifically forbidden by Congress, (the Appropriation Acts clearly permit use of W. P. A. funds upon public high-

ways), but for having caused the funds to be used on public highways of a type or class which had not been designated for such work by Kortepeter's superiors.

The intent to defraud the United States necessary to conviction under any count of the indictment could not exist without individual knowledge of the provisions of the various documents which are held to render the work illegal. These were facts, not laws, and absent knowledge of the existence of facts which made the proposed use of W. P. A. funds a fraud upon the United States, the petitioner Derbyshire could not have had or formed the intent to defraud necessary to conviction under any count of the indictment. This principle, with reference to a conspiracy to obstruct the administration of justice, was laid down by this Court in *Pettibone v. United States*, (1893) 148 U. S. 197, 206-207, as follows:

> "It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court. * * *
>
> Undoubtedly it is a condition of penal laws that ignorance of them constitutes no defense to an indictment for their violation, but that rule has no application here. The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when

> justice is being administered. Unless that fact exists, the statutory offense cannot be committed; and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking. It is enough if the thing is done which the statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise."

The principle is also established in *Morrison v. California*, (1934) 291 U. S. 82, where, because a state statute cast upon a defendant the burden of disproving the guilty knowledge essential to a conspiracy, it was held to violate the Fourteenth Amendment.

The Court said (p. 92):

> "In California, *as elsewhere*, conspiracy imports a corrupt agreement between not less than two, *with guilty knowledge* on the part of *each*." (Our italics.)

In the present case no attempt was made to show that petitioner Derbyshire had knowledge of any of the proposals, orders, or bulletins said to have made the building of these roads a fraud upon the United States. Without contradiction the evidence shows that upon inquiry as to the legality of such work, Kortepeter told Derbyshire that it would be necessary to have the roads dedicated to the county. (R. 52, 68.) Derbyshire did dedicate the roads and the dedication was accepted, as conclusively appears from Exhibit B (II R. 304), introduced by the Government. (R. 27.) All this is recognized in the opinion (R. 221). There is absolutely no other evidence tending to show knowledge by Derbyshire of any facts which would make the work unlawful.

We submit that the attempt to supply the want of such knowledge from the circumstance that Derbyshire was (supposedly) obtaining an individual benefit is nothing more than the attempt to substitute some sort of general bad intention for the specific intent required by statute which was condemned in *Pettibone v. United States,* 148 U. S. 197. We quote from page 207:

> "It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but on the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability."

Landen v. United States, (C. C. A. 6, 1924) 299 Fed. 75, is a decision on analogous facts, squarely contrary to the case at bar. There it was held that on charge of conspiracy to defraud the United States by procuring withdrawals of liquor made unlawful by regulations under the National Prohibition Act, knowledge of the existence of the regulations was essential to proof of the intent to defraud, and absent such knowledge the conviction must be reversed.

Even to one with full knowledge of their contents, just which of the determinative writings were controlling of legality and also their proper construction were both questions upon which reasonable minds might differ. Certainly the Court's limitation to "existing highways" and to "farm to market" roads is not quite as clear as the sum of two and two. Consequently it is piling unfounded presumption

upon unfounded presumption to infer from the work itself that it was illegal when this alleged illegality is in truth not axiomatic from inspection of the documents themselves.

Above all it is certainly not true that every expenditure of W. P. A. funds for the exclusive benefit of a single owner is illegal, else rural outbuildings all over the country evidence countless frauds upon the treasury, and abutters on many miles of highways who receive peculiar and individual benefits therefrom are in danger of penal condemnation of which no one ever dreamed.

Those who have in good faith accepted and even sought these conveniences and bounties from public treasuries, national and state, are not to be branded criminals merely because of the special privileges which they enjoy. Lack of a highly developed sense of self-denial is not of itself evidence of intent to defraud.

IV.

The judgment should be reversed as to both defendants under any ground stated in the petition. Since a conspiracy required more than one conspirator, acquittal of Derbyshire necessarily requires acquittal of Kortepeter.

A decision in petitioners' favor on either of the first two questions presented by the petition necessarily applies to each petitioner alike. The third ground, while concerned with the absence of guilty intent on the part of petitioner Derbyshire, likewise requires reversal of the judgment as to Kortepeter for reasons clearly stated in the opinion of this Court in *Morrison v. California*, (1934), 291 U. S. 82, at page 93, as follows:

"Doi was not a conspirator, however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design. *Pettibone v. United States, supra; Gebardi v. United States,* 287 U. S. 112, 113. The joinder was something to be proved, for it was of the essence of the crime. Without it there was a civil wrong, but not a criminal conspiracy, the only crime denounced. *In re Akado, supra.* The conviction failing as to the one defendant must fail as to the other. *Turinetti v. United States, supra; Williams v. United States,* 282 Fed. 481, 484; *Gebardi v. United States, supra.*"

CONCLUSION.

In this brief no attempt has been made to discuss at length the extremely involved issue of the application and construction of the various proposals, applications, Presidential Letters and bulletins referred to in the indictment and introduced in evidence for the purpose of establishing that the work done and contemplated to be done upon the roads here in question was illegal and unauthorized.

The doubtful applicability of any of these instruments and their vague and in many cases contradictory statements serve but to illustrate the point that petitioners were seriously harmed by the failure of both the Trial Court and Appellate Court to declare definitely just which documents, if any, were controlling and in permitting a jury verdict on such a question to stand without decision of the question as one of law. The entire record is such as to lead to the conclusion that petitioners have been convicted not because of unauthorized or illegal use of the public moneys or other offenses against the United States, but solely because the petitioner Kortepeter caused W. P. A. work to

be performed on roads which were of peculiar benefit to his father-in-law, Derbyshire.

However reprehensible this conduct may appear from the standpoint of ethics or good morals, it would be a very dangerous doctrine to sustain on this ground alone a conviction of conspiracy to defraud the United States. The entire public controversy which has been waged with reference to the propriety, wisdom and expediency of the work relief program and the method of its administration is, we submit, good and sufficient reason for this Court to scrutinize carefully the conviction of these petitioners under a record such as this. When criminality is made to depend upon supposed distinctions between the improvement of existing highways and highways, however useful, not dedicated to public use at the time of the appropriation, and when the public utility or degrees thereof are made tests of liability under Presidential authorizations which prescribe only public ownership, there is good ground for suspecting that doubtful official morality has been confused with official malfeasance.

It is earnestly urged, therefore, that the judgment of the Circuit Court of Appeals for the Seventh Circuit be reviewed and in all things reversed.

Respectfully submitted,

PAUL Y. DAVIS,
Attorney for Petitioners.

ERNEST R. BALTZELL,
WILLIAM G. SPARKS,
GUSTAV H. DONGUS,
Of Counsel.

APPENDIX OF STATUTES INVOLVED.

STATUTES INVOLVED.

Emergency Relief Appropriation Act of 1937. 50 Stat. 352, as amended, 52 Stat. 817.

"TITLE I.

"That in order to continue to provide relief, and work relief on useful public projects, in the United States and its Territories and possessions . . . there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to remain available until June 30, 1938, and to be used in the discretion and under the direction of the President, $1,500,000,000 . . . Provided, That this appropriation shall be available for the following classes of public projects, Federal and non-Federal, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: (a) Highways, roads, and streets, $415,000,000;". . . .

"Sec. 12. Any person who knowingly and with intent to defraud the United States . . . diverts, or attempts to divert or assists in diverting, for the benefit of any person or persons not entitled thereto, any portion of such appropriation, or any services or real or personal property acquired thereunder, . . . shall be deemed guilty of a misdemeanor and fined not more than $2,000 or imprisoned not more than one year, or both."

Emergency Relief Appropriation Act of 1937. 52 Stat. 809.

"Section 1. That in order to continue to provide work relief on useful public projects, and relief, in the United States and its Territories and possessions, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to remain available until June 30, 1939, as follows:

"(1) To the Works Progress Administration, $1,425,000,000, together with the balances of allocations heretofore made or hereafter to be made to the Works Progress Administration under the Emergency Relief Appropriation Act of 1937 and the joint resolution of March 2, 1938, which remain unobligated on June 30, 1938, and such amounts shall be available for (a) administration; (b) the prosecution of projects approved for such Administration under the provisions of the Emergency Relief Appropriation Act of 1935, the Emergency Relief Appropriation Act of 1936, and the Emergency Relief Appropriation Act of 1937, and the joint resolution of March 2, 1938, which projects shall not be subject to the limitations (1), (2), and (3) of (d) hereof; (c) aiding self-help and cooperative associations for the benefit of needy persons; and (d) the following types of public projects, Federal and non-Federal, subject to the approval of the President, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: (1) Highways, roads, and streets, $484,500,000;".

Section 19 of the above act is identical with Section 12 of the Act of 1937 above quoted.

Criminal Code, § 37, R. S. § 5440, 35 Stat. 1096, 18 U. S. C. A. § 88.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any

purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Indiana Acts 1931, Ch. 88, § 1, p. 254, Burns Ind. Stat. 1933, § 19-1916.

"The first day of the week, commonly called Sunday; . . . October twelfth, commonly known as Discovery Day; . . . shall be legal holidays within the state of Indiana for all purposes."

FILED
JAN 9 1941
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CLERK

Nos. 532 and 533

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

CARL F. KORTEPETER,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

GURNEY G. DERBYSHIRE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF JUDGMENT DENYING CERTIORARI
With Supporting Brief

PAUL Y. DAVIS,
Attorney for Petitioners Carl F. Kortepeter and Gurney G. Derbyshire.

ERNEST R. BALTZELL,
WILLIAM G. SPARKS,
GUSTAV H. DONGUS,
Of Counsel.

C. B. Pauley & Co., Inc., Indianapolis

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

CARL F. KORTEPETER,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.
No. 532.

GURNEY G. DERBYSHIRE,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.
No. 533.

PETITION FOR REHEARING OF JUDGMENT DENYING CERTIORARI

Petitioners Carl F. Kortepeter and Gurney G. Derbyshire each respectfully move the Court to grant a rehearing of the order entered December 16, 1940, denying certiorari

in the above cases, and upon such rehearing to grant writs of certiorari as prayed in the original petition herein.

In support of such application for rehearing, petitioners respectfully submit the annexed brief.

PAUL Y. DAVIS,
Attorney for Petitioners
Carl F. Kortepeter and
Gurney G. Derbyshire.

ERNEST R. BALTZELL,
WILLIAM G. SPARKS,
GUSTAV H. DONGUS,
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IN THE

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Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.
No. 533.

BRIEF ON PETITION FOR REHEARING

Petitioners have been convicted of conspiracy to defraud the United States. The essence of the alleged "fraud" is the use of public moneys for an unauthorized purpose. We believe it will be conceded that if the moneys were expended for an authorized purpose, the fact that the expenditure inured to the benefit of a relative of the respon-

sible official did not render the use unauthorized. Nepotism does not constitute fraud upon the United States within Section 37 of the Criminal Code, however morally reprehensible.

Firmly believing that the result reached by the jury and by both Courts below would seem patently fantastic if this element of nepotism were disregarded, and that apart from this the petitioner Derbyshire has been convicted of corrupt intent to defraud upon evidence which at most shows only negligence, we earnestly urge this Court to reconsider its order denying certiorari in the above cases. Since the Government's brief opposing certiorari advances what would appear to be all possible contentions in support of the judgment below, our presentation will take the form of a reply to that brief.

I

The trial court erroneously submitted to a jury, and the Circuit Court of Appeals erroneously accepted the jury's verdict upon a question of law involving the construction of written documents and their application to uncontroverted extraneous facts, and this error resulted seriously to the prejudice of both petitioners.

That the Circuit Court of Appeals did give effect to a jury verdict upon a question of construction, without passing upon that question as matter of law, is tacitly admitted by the following language in the brief for the United States:

> "If the abstract principle urged by the petitioners, that the construction of written instruments is a question of law for the decision of the trial court,

> has any application here, the petitioners clearly were not prejudiced by the submission of the issue of authorization to the jury. The argument heretofore advanced makes it manifest, we believe, that the trial court would have had to determine that the work done with W.P.A. funds and labor on petitioner Derbyshire's land did not come within the purview of authorized work." (pp. 16-17.)

We submit that the "argument advanced" does *not* make this proposition "manifest." The conclusion can only be reached by ascribing controlling force to certain writings not legally controlling, by ignoring writings in fact controlling, and by implying unwarrantable restrictions into controlling writings which do not express such restrictions.

Take for example the asserted limitation of the use of funds to "existing roads," presumably meaning that use was limited to roads used as such at the time of the last "project proposal." No such limitation is found in any Presidential Letter. The *last* Presidential Letter allots funds "to improve county owned roads throughout Marion County." (Ex. 4, II R. 173, 175.)

The roads here in question were dedicated to public use and the dedication was accepted by the proper public authority, the Board of Commissioners of Marion County. (Ex. A, II R. 304.) Ancient authority recognizes this method of creating a public road. *Rex v. Mellor,* 1 Barn. & Adol. 32, 35. No claim is made that the roads did not thus become *county owned* roads. No claim is made that the work done was not within the specific description of the authorization, namely "filling," "grading," "cutting ditches," and "clearing."

Moreover, this authorization follows the exact language of the application (Ex. 3, II R. 170-172) which also contains the specific statement that "this new application is for continuation of work formerly approved including additional units not formerly estimated." (Ex. 3, II R. 172.)

To obtain the asserted limitation to "existing roads" counsel refer simply to the "proposal" and "letter" and the opinion of the Circuit Court of Appeals, and *assert* without argument that these "did not contemplate the construction of any new roads." They thus attempt to give the "proposal" controlling force over the "letter," as well as the "application"; and to ignore the direct reference to the continuation of work previously authorized by the "letter" of 1937 (Ex. E, II R. 307, 319) which admittedly authorized new construction. Moreover that part of the "proposal" itself upon which reliance is placed is not found in the project description (Ex. 2, Item 4, II R. 154) but in the justification clause (Ex. 2, Item 17, II R. 156), which is "a short concise statement giving reason or necessity for the proposed project," and which, while referring to the repair and rehabilitation of roads damaged by winter, does not contain any express limitation to "existing roads" or exclusion of new construction. "Manifestly" it is the sheerest sophistry so to construe the authorization.

The Government's brief also says, "The proposal specifically listed some 59 streets or roads upon which repair or improvement was contemplated." The list referred to forms no part of the "proposal," which consists of but 5 pages. The proposal itself makes no reference to any subjoined exhibit or list. The list itself makes no reference to the proposal. Its purely apocryphal presence was not explained at the trial, nor did the indictment charge

that funds were expended on "unlisted" roads. Hence, it is purely an assumption that this apocryphal list, not mentioned in proposal, application, or letter, prescribes the limit of the construction permitted.

Application to the instant case of Indiana State Bulletin No. 27, dated October 28, 1935, also rests on unsupported assumption. Just how or by what authority a bulletin issued by the Indiana State Administrator in 1935 could control a Presidential authorization of 1938 is nowhere explained. It is merely assumed. Moreover, the phrase "specific purposes outlined in the project proposal" would seem to refer to proposals specifying work at particular locations, not to "blanket" or "county-wide" projects like the ones here in question, which by the very terms of the Presidential authorizations were "In addition to projects specifically approved" (Ex. 4, II R. 175), or "Exclusive of projects specifically approved." (Ex. E, II R. 319, Ex. F, II R. 332.)

Limitation to "farm to market highways" is based on the same sort of argument as the imaginary limitation to "existing roads." This phrase is not found in either the Presidential Letter of August 12, 1938 (Ex. 4, II R. 174, 175), the application of July 11, 1938 (Ex. 3, II R. 170-172) or in the project description of the sponsor's proposal. (Ex. 2, II R. 154.) In the proposal it appears under item "17. Justification," in the phrase "The resulting work will provide a hard surface belt only on farm to market highways in this county." (Ex. 2, II R. 156.) To use this sentence as a limitation on the Presidential authorization would permit nothing but *hard surface* roads, thereby excluding gravel surfacing, which was specifically authorized by both preceding Presidential authorizations. (Ex. E, II R. 319, Ex. F, II R. 332.) This is also inconsistent

with the apocryphal list of *gravel roads* attached to the project proposal (Ex. 2, II R. 168), a further illustration of the tangled web which counsel for the Government have attempted to weave.

Reference is also made to the language of the Appropriation Act, which it is said "required that the projects upon which the money was to be expended be useful public projects," and by indirection it is asserted that these roads were outside this definition because (it is claimed) "The work enured to the benefit of the owner of a tract of land which had not yet been subdivided, and the work admittedly benefited no one but himself." (Brief, p. 14.)

Considering an almost identical argument made in *Rindge Co. v. Los Angeles County,* (1923) 262 U. S. 700, this Court said (pp. 706-707):

> "The ranch owners concede that a genuine highway, in fact adapted as a way of convenience or necessity for public use and travel, is a public use. Their real contention is that these particular roads, while called highways, are 'highways' in name merely, that is, that they are shams under the name of public improvements, which cannot, in fact, furnish ways of convenience or necessity to the traveling public. This argument is based upon the fact that they extend through the ranch alone, the main road terminating within its boundaries, and connect with no other public roads at their western and northern ends. These roads will, however, be open to the general public to such extent as it can and may use them. * * * It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use."

This argument is sought to be bolstered by reference to Indiana State Bulletin No. 103, forbidding W.P.A. work on *streets* in undeveloped areas where abutting property is in the hands of a small number of individuals. This argument assumes that violation of the order of a state administrator, even if authorized, would constitute *fraud* upon the United States, and also wholly ignores the fact that the bulletin is much broader than General Letter 190, upon which it purports to be based. General Letter 190, (Ex. 69, II R. 180) has on its face no application to the prosecution of work but prescribes eligibility requirements as a guide to the preparation of project applications.

Finally it is sought to render inapplicable the broad authorization of the original Presidential letter of July by the assertion "that the word 'construct' was *undoubtedly* used in the Presidential letter of July 17, 1937, because the project proposal upon which it was based sought funds not only for the repair and improvement of existing highways, but also for new construction."

The claimed basis for this assertion is the use of the word "construction" in the proposal, coupled with the wholly unwarranted assumption that to "construct roads" necessarily refers to roads not previously existing, while to "improve roads" must refer to roads then in use.

Having thus begged the question, the conclusion is drawn that the original authorization for work where easements *will be* obtained, applied only to the original project, and the supplement and continuation projects did not cover work on so-called "new roads." One is left in the dark as to whether the easements must have been granted *before* the proposal, *before* the application or merely *before* the Presidential authorizations. Obviously the existence or

non-existence of a *road* does not depend on whether it is dedicated to the public, and a public road might be "constructed" on the site of a previously used private road dedicated to public use or such a private road might be "improved" after public dedication.

This makes absurd the argument that would impose the wholly meaningless restriction to "existing roads" from the use of the word "improve" and attribute the authorization for expenditures where easements "will be obtained" to the use of the word "construct."

We submit that had the Trial Court instructed the jury that the evidence showed unauthorized use of public funds, or more specifically, that the roads built were without the scope of the project because not "existing" roads, or not "farm to market" roads, or not "public" roads or because all abutting property was owned by Derbyshire, it would clearly have been error. Yet it is now claimed that the action of the Circuit Court of Appeals in accepting the jury's verdict upon this question of construction is harmless because the jury *might* have found that for some one or more of these reasons the work was unauthorized.

The question was presented to the Circuit Court of Appeals by assigning error on the failure to direct a verdict; the Circuit Court of Appeals refused to decide it but held that "the evidence was such as to require this question to be submitted to the jury."

This, we earnestly urge, resulted in the conviction of the defendants, although the expenditure made was wholly within the scope of the authorization, merely because Kortepeter was guilty of favoring his father-in-law. This is not the crime denounced by statute, and is not the crime with which he was charged.

II

In sustaining the conviction of petitioner Derbyshire of conspiracy to defraud the United States, the Circuit Court of Appeals has permitted intent to defraud to be inferred from what was at most mere negligence.

Having resorted to a most involved process of interpretation to establish that permitted construction was limited to "existing" "farm to market" highways, and was circumscribed by a state bulletin issued in 1935 and a further state bulletin issued in 1938, and having labored to avoid application of broader language of these same writings in order to convict Kortepeter of diversion of funds, a complete change of front is made when Derbyshire's intent is in question.

There being a total absence of evidence to show Derbyshire's knowledge of any of the proposals, applications, letters, or bulletins, which are relied upon to render the work unauthorized, reliance is placed upon assertion that the work benefited "no one other than himself," and upon his close family relationship with Kortepeter.

It is asserted that Derbyshire was chargeable with knowledge "that by statutory direction W.P.A. funds and labor could be used only on useful public projects." It is not in terms asserted that this was not a "public" project, or that it was not "useful" to the public in the sense that it was not capable of being used by the public. It is merely assumed that it was not a "useful public project" because it was of primary benefit to Derbyshire. But the roads were "county owned." They were capable of public use by such members of the public as might desire to use them. It was "not essential that the entire community, nor even

any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use." *Rindge v. Los Angeles County* (1923) 262 U. S. 700, 707. There was, therefore, nothing in the statute to charge Mr. Derbyshire with knowledge that this was an unauthorized work, because it in fact was a project of public use and therefore a "useful public project" within the terms of the statute.

That the jury could properly base an inference of Derbyshire's guilty knowledge upon the family relationship between him and Kortepeter is fantastic beyond imagination. Even if Kortepeter himself had believed the work unauthorized, which conclusion, apart from the jury's verdict, is quite far fetched, in view of the total absence of any attempt at concealment or camouflage, certainly it is not matter of common experience that the relationship of father-in-law and son-in-law has matrimonial unity. Not only uncontradicted evidence, but corroborating circumstances indicate Derbyshire's belief that public dedication of the highways was the sole requisite to the lawfulness of this construction.

The rule adopted by the Circuit Court of Appeals is in effect that one acts at peril in accepting a benefit arising from the expenditure of public funds. He may be adjudged guilty of fraudulent intent because "he ought to have known," although he in fact did not know that the use was unauthorized, and even where, as here, all that he did know was such as to induce the affirmative belief that the work was authorized.

This, we submit is squarely contrary to the decisions of this Court cited in our petition for certiorari, and also squarely contrary to the general law.

2 Wharton, Criminal Law (1932) Sec. 1608, states the general rule as follows:

> "We must also hold to advance a step further, that there cannot be a negligent conspiracy. Joint evil intent is necessary to constitute the offense. 'The confederation must be corrupt. This is implied in the meaning of the term conspiracy.' "

Here uncontradicted evidence shows that Derbyshire knew only that the roads must be dedicated to public use. There is no claim that he knew of the limitations, actual or supposed, which limited authorized construction to "existing" roads, or "farm to market" roads, and are claimed to have prohibited roads abutting the lands of a single owner.

He is convicted because "he ought to have known," in short, merely because he is found negligent.

We submit that the application by the Circuit Court of Appeals of these novel and erroneous doctrines has not only seriously prejudiced petitioners, but has also placed in peril of prosecution and punishment numerous other wholly innocent individuals whose only offense is that they have co-operated with the work relief program by furnishing places to work.

We therefore earnestly urge that the action of this Court denying certiorari be reconsidered, and that such writ be granted.

PAUL Y. DAVIS,
Attorney for Petitioners
Carl F. Kortepeter and
Gurney G. Derbyshire.

ERNEST R. BALTZELL,
WILLIAM G. SPARKS,
GUSTAV H. DONGUS,
Of Counsel.

CERTIFICATE OF COUNSEL

I, Paul Y. Davis, counsel for the above-named Carl F. Kortepeter and Gurney G. Derbyshire, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

PAUL Y. DAVIS,
Attorney for Petitioners
Carl F. Kortepeter and
Gurney G. Derbyshire.

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Riddle v. *United States*, 279 Fed. 216, certiorari denied, 259 U. S. 586	19
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Statutes:

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 532

CARL F. KORTEPETER

v.

THE UNITED STATES OF AMERICA

No. 533

GURNEY G. DERBYSHIRE

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 220–227) is reported in 114 F. (2d) 124.

JURISDICTION

The judgment sought to be reviewed was entered July 22, 1940 (R. 227), and a petition for rehearing was denied September 24, 1940 (R. 229). The petition for writs of certiorari was filed October 29, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal question presented is whether there was sufficient evidence to warrant the submission to the jury of the third count charging a conspiracy to defraud the United States by unlawful diversion of W. P. A.[1] funds and labor.

A subsidiary question is whether reversible error resulted because of the trial court's failure to rule as a matter of law upon the interpretation of a series of W. P. A. instruments in connection with the issue whether the work was authorized with respect to which the W. P. A. funds and labor were alleged to have been unlawfully diverted.

STATUTE INVOLVED

U. S. C., Title 18, Section 88 (Criminal Code, Section 37) insofar as pertinent, provides:

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[1] The Works Progress Administration will be generally referred to as W. P. A.

> If two or more persons conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

The third count of the indictment charged petitioners with conspiring to defraud the United States by the unlawful diversion of W. P. A. funds and W. P. A. labor paid from W. P. A. funds in the construction of roads upon certain unimproved real estate owned by the petitioner Derbyshire in Marion County, Indiana (R. 3–13).[2]

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[2] Counts one and two of the indictment (R. 1–2) were based on Section 19, Title I, of the Emergency Relief Appropriation Act of 1938, c. 554, 52 Stat. 809, 814–815. This section provides, in part, that "Any person who knowingly and with intent to defraud the United States * * * diverts, or attempts to divert or assists in diverting, for the benefit of any person or persons not entitled thereto, any portion of such appropriation, or any services or real or personal property acquired thereunder * * * shall be deemed guilty of a misdemeanor and fined not more than $2,000 or imprisoned not more than one year, or both." Both petitioners were convicted upon all three counts of the indictment (R. 102). The petitioner Derbyshire was sentenced generally to imprisonment in a penitentiary for a year and a day and fined $1,000 and the petitioner Kortepeter was sentenced generally to imprisonment in a reformatory for 18 months and fined $1,000 (R. 158–159). Feeling that these sentences could not be sustained under the first and second counts, charging misdemeanors, the Government conceded in its

1. By the Emergency Relief Appropriation Act of 1937, c. 401, 50 Stat. 352, 353, the expenditure of $1,500,000,000, together with the expenditure of certain unexpended balances of prior appropriations, was authorized during the fiscal year ending June 30, 1938 "in order to continue to provide relief, and work relief on useful public projects, in the United States and its Territories and possessions." It was provided that the appropriation would be available "for the following classes of public projects, Federal and non-Federal, and the amounts to be used for each class shall not * * * exceed the respective amounts stated, namely: (a) Highways, roads, and streets, $415,000,000 * * *." Appropriations for similar purposes were made in the Emergency Relief Appropriation Act of 1938 (52 Stat. 809).

In both Appropriation Acts it was provided that no non-Federal project shall be undertaken or prosecuted unless and until the sponsor has made a written agreement to finance such part of the entire cost thereof as is not to be supplied from Federal funds (50 Stat. 353; 52 Stat. 811).

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brief in the Circuit Court of Appeals (p. 42) that it would have to uphold the sentences under the third or conspiracy count. While this concession would appear to be warranted as to Derbyshire, who was sentenced to imprisonment in a penitentiary, it is not entirely clear that the concession was required to be made as to Kortepeter, who was sentenced to a reformatory. Since, however, the Government feels that the sentences as to both petitioners can be sustained under the conspiracy count, it deems it unnecessary to give consideration to the misdemeanor counts.

On March 16, 1937, the Board of County Commissioners for Marion County, Indiana, submitted to the Works Progress Administration for the Sixth District, which consisted of Marion County, its written Project Proposal, in which it requested the review thereof and that a formal application be made for the allotment of WPA funds in the amount of $828,518 for the conduct, prosecution and operation of the project therein described. This project was stated to be the construction of approximately 100 miles of bituminous macadam roadways and the construction and reconstruction of approximately 50 miles of gravel roadways in Marion County. It was agreed that the project would be conducted only on property owned by Marion County. In justification of the proposal it was stated that the bituminous asphalt work would complete a hard-surfaced belt highway in Marion County 150 miles long, and that the other work would consist of repairing and rebuilding 50 miles of farm-to-market roads, recent floods having seriously damaged many bituminous and gravel roads. It was also specifically stated that the proposed project was intended for the use & benefit of the public. The proposal contained a "breakdown" of estimated costs, including the amounts and percentages to be contributed by the Federal Government and by Marion County. On the same day the petitioner Kortepeter, who was then W. P. A. Assistant Supervisor of Operations

in Marion County (R. 20), signed a Project Application, which likewise was signed by the Indiana State Administrator of W. P. A. on April 5, 1937, requesting the allocation of W. P. A. funds for the proposed project. This application described the project in the same language as the proposal. In the application it was stated that no improvements would be made on private property. On July 17, 1937, the President approved the project and allotted the sum requested, the project being known as Official Project No. 465–52–1–15.[3] (Defts.' Ex. E, II, R. 471–486).[4]

On March 15, 1938, the County Comissioners of Marion County submitted to the Works Progress Administration a second Project Proposal supplementing the first and requesting that an applica-

[3] Projects, to be accepted by W. P. A., have to be sponsored by some governmental unit, such as a city, county, or township (R. 66). Projects in Marion County were initiated by the "proposal" executed by the governmental sponsor, but this proposal was actually prepared in the Operations Department of W. P. A. under Kortepeter's supervision. The proposal and the second necessary instrument—an application signed by Kortepeter and the State Administrator of W. P. A.—were then sent to Washington for approval, and were the basis of the "Presidential letter" authorizing the project (R. 18, 67, 73, 221).

[4] The record in this case consists of one bound printed volume, numbered from page 1 to page 237, and one unprinted volume of exhibits the pages of which are individually numbered from 296 to 506, inclusive. Consistent with the practice followed by the petitioners (Pet. 2, footnote), the printed volume is referred to herein as "R" while the unprinted volume is referred to as "II R."

tion be made for the allotment of $1,005,959 for the conduct, prosecution and operation of the project described therein, which was the repair and improvement of county roads throughout Marion County. This proposal contained the usual "break-down" of estimated costs. In justification of the proposal it was stated that supplemental funds were needed because of the approved extensive additional plans for a greatly enlarged farm-to-market highway system throughout the County. The project application in connection with this proposal was signed by Kortepeter, who, at that time had become W. P. A. Supervisor of Operations and Coordinator (R. 20), on April 7, 1938, and by the State Administrator on April 20, 1938. The description of the project in the application followed that of the proposal, and on May 9, 1938, the President approved the project and allotted the funds requested (Defts.' Ex. F, II R. 488–503).

On June 17, 1938, a third Project Proposal was submitted by the County Commissioners of Marion County with the request that the Works Progress Administration apply for an allotment of $2,187,-179 for the conduct, prosecution, and operation of the project therein described. This proposal, which was couched in much the same language as the second one, stated that the project involved the repair and improvement of county-owned roads at various locations throughout Marion County, including widening, filling, grading, draining, side

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ditching, berming, surfacing, clearing, resetting fences, and landscaping; widening and constructing small bridges, culverts, and other structures; painting bridges; and performing appurtenant work. In justification of the proposal it was stated that during the Spring considerable damage had been caused to many miles of bituminous and gravel roads by heavy rains which washed out many of the shoulders and portions of the roads, and in some parts of the County even the entire roadbed; that the work proposed would provide a hard-surfaced belt only on farm-to-market highways in the County; and that in the reconstruction and rebuilding of these roads it was planned to widen them as well as the culverts and bridges included in the right-of-way. In this proposal, as in the other ones, there was a "break-down" of estimated costs. The proposal also contained a list of the 59 streets and roads upon which repair or improvement was contemplated and the precise mileage involved, even to fractions of miles (Gov. Ex. 2, II R. 298–313).

Kortepeter signed the project application on June 30, 1938, and it was signed by the State Administrator on July 11, 1938. The application described the project in the terms of the proposal. It was stated in the application that no improvements would be made on private property but only upon property owned by the County, and that the application provided for a continuation of work

formerly approved (Gov. Ex. 3, II R. 315–317). The President approved the project and allotted the sum requested on August 12, 1938 (Gov. Ex. 4, II R. 319–321). The project bore a new number (No. 65–52–1–36).

On July 15, 1938, the Indiana Administrator of W. P. A. transmitted to District Directors and Supervisors Indiana State Bulletin No. 103 (Gov. Ex. 68, II R. 327), to which was attached W. P. A. General Letter No. 190, issued from Washington on July 12, 1938 (Gov. Ex. 69, II R. 329). This Bulletin, referring to the General Letter, stated:

I. GENERAL LETTER NO. 190

1. General Letter No. 190, copy attached, is hereby made a part of the Indiana procedure.

II. IMPROVEMENT TO STREETS AND UTILITIES IN UNDEVELOPED AREAS

1. It shall be noted that the improvement to streets and utilities in undeveloped areas where the abutting property is in the hands of a real estate firm or a small number of individuals is inelegible. This means that such work cannot be prosecuted on approved projects operating or to be operated, and such work shall not be included in project applications.

III. CONTROL

1. It shall be the responsibility of the District Office to insure absolute compliance with all the provisions of this bulletin.

2. In 1938, and for a number of years prior thereto, Derbyshire was the owner of an unimproved 14-acre tract of farm land in Marion County, Indiana (R. 15, 23, 55). In 1924, Derbyshire had this land surveyed and a plat prepared showing the subdivision of the land into residential lots, with several roads or streets. He did nothing further, however, at this time (R. 55, Defts.' Ex. D, II R. 469).

Kortepeter, the son-in-law of Derbyshire, was employed in July 1935, by W. P. A. as Supervisor, Division of Projects and Planning, in Marion County. In August, 1937, he became the Supervisor of Operations and Coordinator for W. P. A. in Marion County, and continued in that position until his services terminated in February, 1939. Kortepeter was the highest ranking officer of W. P. A. in Marion County, and had charge of the operation and conduct of W. P. A. activities in that County (R. 20). One of his duties was "to work up and get different types of projects that relief labor could work on" (R. 66).

Derbyshire, at a date not definitely fixed, but probably in May or June, 1938 (R. 23), consulted Kortepeter as to whether W. P. A. would build some roads on the former's property, and was told that before the work could be undertaken Derbyshire would have to have a plat made of the property and dedicate the proposed roads or streets to the County (R. 52, 68). Under Kortepeter's

supervision a plat of the land was made (Defts.' Ex. A, II R. 465) and a purported dedication, dated September 3, 1938, prepared (Defts.' Ex. B, II R. 467). While the land was surveyed by an engineer of W. P. A., at Kortepeter's request, the engineer did not perform this service as one of his official duties (R. 23–25). The plat showed two roads upon the property but, unlike the 1924 plat, did not subdivide the property into residential lots. Although a copy of the "Highway Dedication Plat," produced in court by the petitioners, bore the inscription "Approved this 8th day of September, 1938" and the signatures of the County Commissioners (Defts.' Ex. A, *supra*), it was stipulated that neither the plat nor the alleged dedication were on file or of record in the office of any officer in Marion County (R. 15).

Upon Kortepeter's order, the construction of two roads, known as Fable Road and Loretta Avenue, was undertaken by W. P. A. labor on Derbyshire's land, beginning in November, 1938. These roads were not included in the list of 59 streets and roads contained in the proposal of June 17, 1938 (*supra,* pp. 7–8). In addition to equipment, the services of 40 or 50 men were utilized in the work, which continued until it was ordered stopped by W. P. A. officials in February 1939. The property on which the work was carried on was "empty, unimproved land" (R. 28, 30), and one of the roads apparently ran through an apple orchard and

stopped at a fence (R. 54). The cost of the W. P. A. operations on Derbyshire's land was about $10,000 (R. 46), and it was testified by Kortepeter that this money was paid from the funds allotted by the Presidential letter of August 12, 1938, *supra,* p. 9 (R. 78). Derbyshire testified that no one else could use the roads except the owner of the land, who was himself, and that the roads would materially increase the value of his land. He explained that the reason he seized upon the opportunity to build the roads at the time was that "If they [W. P. A.] could do that and make me that present, I would be foolish not to accept it" (R. 55).

ARGUMENT

1. Petitioners argue, in effect, that the two roads which were constructed on Derbyshire's land with WPA funds and labor came within the purview of authorized work. There is clearly no basis for any such contention.

Petitioner Kortepeter admitted in his testimony that the funds used in doing this work were allotted by the Presidential letter of August 12, 1938 (R. 78), the one approving the project proposal submitted by the Board of County Commissioners of Marion County on June 17, 1938, and awarding the sum requested in such proposal (*supra,* pp. 7–9). That proposal and letter, as explained in detail by the Circuit Court of Appeals (R. 222–223), did not

contemplate the construction of any new roads, but only the repair and improvement of existing county-owned roads.

Moreover, the proposal specifically listed some 59 streets or roads upon which repair or improvement was contemplated. The roads constructed on Derbyshire's land were not included in this list. The proposal, in requesting the allotment of a specific sum from W. P. A., also contained a "break-down" of the estimated costs of the repair and improvement work for which funds were requested, including the amounts and percentages to be contributed by the Federal Government and by Marion County, and the precise sum requested was allotted by the President.

The project in question must, therefore, have contemplated no work other than that defined therein. Indeed, Indiana State Bulletin No. 27 (Gov. Ex. No. 70, II R. 455), dated October 28, 1935, long prior to the work done on Derbyshire's land, specifically states that Presidential approvals are "for only the specific purposes outlined in the project proposal." The acceptance of the petitioners' contention would permit local W. P. A. officers, after the Presidential approval of the sponsor's proposal, to initiate new and inconsistent projects not contained in the approved proposal, without the requisite sponsorship of a governmental unit, without any estimate or "break-

down" of costs, and without any agreement on the part of the governmental unit to bear its share of the costs as required by statute.

Not only were the funds allotted by the President for the project to be expended for the repair and improvement of existing roads, not the construction of new roads, but it is apparent that the roads constructed on Derbyshire's land were not of the character with which the project was concerned. The proposal for that project, as well as the earlier project proposals referred to in the Statement (*supra,* pp. 5–9), make it clear that the roads upon which the work was to be done formed a part of an extensive farm-to-market highway system in Marion County. "By no stretch of liberal interpretation," as the Circuit Court of Appeals said, "could the two roads or lanes here involved * * * be considered as part of any such highway system." (R. 223.) The work contemplated by the project was obviously work which was to be done for the benefit of the public as a whole, and not solely for the benefit of individual land owners. Indeed, the Appropriation Act pursuant to which funds were made available specifically required that the projects on which the money was to be expended be "useful public projects." Here the work enured to the benefit of the owner of a tract of land which had not yet been subdivided, and the work admittedly benefited no one but himself. Not only was this work not con-

templated by the project proposal and the Presidential letter of authorization, but it was contrary to specific instructions which had been issued four months prior to the execution of the work. Indiana State Bulletin No. 103, quoted at p. 9, *supra*, expressly forbade the improvement with W. P. A. funds of streets and utilities in undeveloped areas where the abutting property is in the hands of a real estate firm or a small number of individuals and it specifically stated that "such work cannot be prosecuted on approved projects operating or to be operated." The Derbyshire property was owned by Derbyshire alone.

Petitioners rely, however (Pet. 12, 19, 21), upon a general heading typed on the top of several pages of the Presidential letter of July 17, 1937 (Defts.' Ex. E, II R. 484–486, *supra*, p. 6), emphasizing the word "construct" therein and the permission that the work authorized could be done "upon property where the necessary leases or easements will be * * * obtained by local authorities." They say this language permitted the construction of new roads and precluded the limitation of the Presidential authorization to existing roads and farm-to-market highways. From this, plus the fact that later project proposals were supplements to and continuations of the broad highway program referred to in the earlier proposal, the petitioners apparently spell out the ultimate conclusion that the work on Derbyshire's land was authorized.

The petitioners' argument, however, overlooks the fact that the word "construct" was undoubtedly used in the Presidential letter of July 17, 1937, because the project proposal upon which it was based sought funds not only for the repair and improvement of existing highways, but also for new construction (*supra*, p. 5). It is obvious, too, that the work authorized pursuant to this and the later project proposals did not embrace work of the character here involved, but work in connection with a broad farm-to-market highway system program. Petitioners' argument further ignores the fact that the specific project proposal pursuant to which were allotted the funds diverted, as well as the Presidential letter of authorization of August 12, 1938 (*supra*, pp. 7–9), although in continuation of the farm-to-market highway program, provided only for the repair and improvement of existing roadways.

2. Petitioners also urge that it was the duty of the trial court to construe the various project proposals, applications, and Presidential letters and determine as a matter of law whether the use of W. P. A. funds and labor in the work done upon Derbyshire's land was authorized, and that the court erred in permitting the question of authorization to be determined by the jury. If the abstract principle urged by the petitioners, that the construction of written instruments is a question of law for the decision of the trial court, has any application here, the petitioners clearly were not

prejudiced by the submission of the issue of authorization to the jury. The argument heretofore advanced makes it manifest, we believe, that the trial court would have had to determine that the work done with W. P. A. funds and labor on petitioner Derbyshire's land did not come within the purview of authorized work. The petitioners, consequently, were benefited rather than prejudiced when the trial court permitted the question to go to the jury, and they, accordingly, have no basis for complaint. Cf. *Berger* v. *United States,* 295 U. S. 78, 82.

3. Petitioners also contend that there was a lack of sufficient evidence of intent to defraud the Government on the part of one of the alleged conspirators, Derbyshire, with the result that the conviction of neither can be supported under the conspiracy count. They assert that there was no evidence that Derbyshire had any knowledge of any of the proposals, orders, or bulletins which made the use of W. P. A. funds and labor in the construction of the roads upon Derbyshire's land a fraud upon the United States, and that he acted in good faith by dedicating the roads to the County when he was told by Kortepeter that the work would be legal if he would make such a dedication.

There can be no doubt that Kortepeter knew that a fraud was being committed upon the Government. And while the Government's evidence of knowledge or intent was not so direct as to Derbyshire, there was, we believe, sufficient evi-

dence to warrant the submission of that question to the jury. It may be possible that Derbyshire may not have known of the various documents which made the work done on his land a fraud upon the Government, but, like every other citizen, he was chargeable with knowledge that by statutory direction W. P. A. funds and labor could be used only on useful public projects. He knew also that the expenditure of public funds upon his land could benefit no one other than himself.

It is also significant that although as early as 1924 Derbyshire had considered converting his land into residential property, going so far as to have his land surveyed and a plat prepared showing the subdivision of the land into lots, the character of the land as farm land was in no wise changed when in 1938, acting upon the advice of his son-in-law, Kortepeter, Derbyshire made a purported dedication of the roads on his land to the County. The plat which was then prepared showed no subdivision of the land into residential lots. It is difficult to believe that Derbyshire could honestly have thought that it was proper to use W. P. A. funds and labor for an improvement which would benefit only a single owner of a tract of farm land and would be of no then value to the public generally.

These factors, together with the close family relationship between Derbyshire and Kortepeter,

who was in charge of all W. P. A. operations in Marion County and who obviously was thoroughly conversant with the permitted scope of W. P. A. projects, constituted, we submit, "acts and indubitable inferences therefrom which, if believed, would warrant an inference of fraudulent intent and guilty knowledge * * *." *United States* v. *Holt*, 108 F. (2d) 365, 369 (C. C. A. 7th), certiorari denied, 309 U. S. 672.[5]

The jury and both courts below were in concurrence as to the probative sufficiency of the testimony. No such showing has been made as to require this Court to reexamine the evidence. *Delaney* v. *United States*, 263 U. S. 586, 589–590.

CONCLUSION

The case was correctly decided below. There is involved no important question of Federal law or any conflict of decisions. We therefore respect-

[5] The Government was not required, of course, to show Derbyshire's complicity beyond a reasonable doubt to warrant the submission of the conspiracy count to the jury. It was sufficient merely for it to introduce some substantial evidence of his guilt. *Riddle* v. *United States*, 279 Fed. 216, 222 (C. C. A. 5th), certiorari denied, 259 U. S. 586; *Berlin* v. *United States*, 14 F. (2d) 497 (C. C. A. 3d); *Meyers* v. *United States*, 94 F. (2d) 433 (C. C. A. 6th), certiorari denied, 304 U. S. 583. It is also well settled that on a motion for a directed verdict the Government's evidence must be considered in the light most favorable to it. *Hodge* v. *United States*, 13 F. (2d) 596 (C. C. A. 6th); *Wilson* v. *United States*, 61 F. (2d) 901 (C. C. A. 9th); *Cohen* v. *United States*, 67 F. (2d) 449 (C. C. A. 4th).

fully submit that the petition for writs of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

WILLIAM E. LINDEN,
General Counsel,
Work Projects Administration.

HARRY B. WIRIN,
Assistant General Counsel,
Work Projects Administration.

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